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CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

MARISELA MAURI

Petitioner,

versus,

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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39 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THIS COURT'S DECISION IN UNITED STATES V. SCOTT, 437 U.S. 82 (1978), WHICH EXPRESSLY OVERRULED UNITED STATES V. JENKINS, 420 U.S. 358 (1975), ALSO OVERRULED FINCH V. UNITED STATES, 433 U.S. 676 (1977), SUB SILENTIO AND, IF IT DID NOT, WHETHER FINCH PROHIBITS **MS. MAURI'S** RE-PROSECUTION FOR CONDUCT SHE HAS ALREADY BEEN TRIED FOR AND ACQUITTED OF.

LIST OF INTERESTED PERSONS

The persons having an interest in the outcome of the case are the Petitioner, her family, the United States Attorney for the Southern District of Florida, the United States District Court for the Southern District of Florida and all the judges of the United States Court of Appeals for the Eleventh Circuit.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
LIST OF INTERESTED PERSONS	ii
TABLE OF CONTENTS	iii
TABLE OF CITATIONS	iv, v
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	14

THIS COURT'S DECISION IN UNITED STATES V. SCOTT, 437 U.S. 82 (1978), WHICH EXPRESSLY OVERRULED UNITED STATES V. JENKINS, 420 U.S. 358 (1975), DID NOT ALSO OVERRULE FINCH V. UNITED STATES, 433 U.S. 676 (1977), SUB SILENTIO AND, SINCE IT DID NOT, FINCH PROHIBITS **MS. MAURI'S** RE-PROSECUTION FOR CONDUCT SHE HAS ALREADY BEEN TRIED FOR AND ACQUITTED OF.

CONCLUSION	30

TABLE OF CITATIONS

CASES	PAGES
Abney v. United States 431 U.S. 651 (1977)	6
Buffington v. Copeland 687 F.Supp. 1089 (W.D. Tex. 1988)	17
City of Dickinson v. Kraft 472 N.W.2d 441 (N.D. 1991)	17
Commonwealth v. Smalis 480 A.2d 1046 (Pa. Super. 1884)	17
Finch v. United States 433 U.S. 676 (1977)	14,15,17,18,22, 23,24,25,28,29
Foster v. State 635 S.W.2d 710 (Tex.Cr. App. 1982)	16
Lee v. United States 432 U.S. 23 (1972)	15,28
People v.Kurtz 414 N.E.2d 699(N.Y. 1980)	17
Rodriguez De Quijas v. Shearson/American Express, Inc. 490 U.S. 477, (1989)	16
State v. Joshua 818 S.W.2d 249 (Ark. 1991)	17
State v. Melin 428 N.W.2d 227 (N.D. 1988)	17
State v. Torres 805 S.W.2d 418 (Tex.Cr. App. 1991)	16

United States v. Harvey 17
392 A.2d 1049 (D.C.Ct. App. 1978)

United States v. Jenkins 14,18,19,20,
420 U.S. 358 (1975) 21,22,23

United States v. Kehoe 17,18
579 F.2d 971 (5th Cir. 1978)

United States v. Lane 17,29
768 F.2d 834 (7th Cir. 1985)

United States vs. Matta 8
937 F.2d 567 (11th Cir. 1991)

United States v. Scott 14,18,22,23,
437 U.S. 82 (1978) 25,27,28,29

United States v. Trevino 8,9,11,12,27
491 F.2d 74 (5th Cir. 1974)

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, **MARISELA DEL PILAR MAURI**, hereby asks that a writ of certiorari issue to review the judgment and the opinion of the United States Court of

Appeals for the Eleventh Circuit entered in Case No. 92-4896 on March 18, 1994.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is contained in an unpublished decision. The decision is reproduced in the Appendix, hereinafter, "A.____."

JURISDICTION

Jurisdiction is invoked under Title 28 U.S.C., Section 1254(1). This petition is filed within the authorized time period following the Eleventh Circuit Court's judgment. See Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> No person shall be . . . subject for the same offense to be twice put in jeopardy for the same offense.

STATEMENT OF THE CASE

Petitioner, **MARISELA MAURI**, the appellant in the United States Court of Appeals for the Eleventh Circuit, will be referred to by name herein. Respondent, the United States of America, the appellee below, will be referred to as the "government". The references to the Record-on-Appeal used by the Eleventh Circuit which is now in the possession of the Clerk of that Court will be designated by the letter "R" followed by the volume number and page number.

On March 11, 1992, a Federal Grand Jury returned Indictment No. 92-6033-Cr-PAINE which charged **MS. MAURI** with two [2] counts of violating Title 18, United States Code, §1709. Count I charged **MS. MAURI** as follows:

> On or about August 19, 1991, at Fort Lauderdale, Broward County, in the Southern District of Florida, the defendant,

MARISELA DEL PILAR MAURI a/k/a "MARISELA DEL PILAR NUNEZ"

while an officer of the United States Postal Service, did knowingly and willfully embezzle a letter which was contained within the General Mail Facility, 1900 West Oakland Park Boulevard, Fort Lauderdale, Florida addressed to Treva M. Devers, 9870 Nob Hill Ct., Sunrise, Florida 33531-4621, which letter was entrusted to be conveyed by mail; in violation of Title 18, United States Code, §1709.

Count II differed only from Count I in that it pertained to a letter addressed to Edwin W. Glukin, 4919 Umbrella Tree Lane, Fort Lauderdale, Florida 33319-5347. R1-1.

On August 20, 1992, **MS. MAURI** filed a "Motion to Dismiss" which asked the district court to dismiss with prejudice this Indictment because the Double Jeopardy Clause prohibited the government from prosecuting her on the charges contained therein. Specifically, **MS. MAURI**'S motion demonstrated that because she had already

been placed in jeopardy under Indictment 91-6179-Cr-PAINE for the exact same conduct underlying Indictment No. 92-6033-Cr-PAINE, she could not again be prosecuted on the latter Indictment.

On September 15, 1992, the government filed its Response to **MS. MAURI**'S Motion to Dismiss. R1-30. On September 16, 1992, the district court announced in open court it had reviewed **MS. MAURI**'S Motion to Dismiss and the government's response thereto and decided to deny it. R2-2. A written Order was filed two days later. R1-31.

When **MS. MAURI** advised the district court she wished to file an interlocutory appeal of its ruling pursuant to Abney v. United States, 431 U.S. 651 (1977), the district court stated it did not believe her Motion to Dismiss was "frivolous".

R2-3. **MS. MAURI** thereafter appealed the district court's ruling on Motion to Dismiss to the United States Court of Appeals for the Eleventh Circuit. On March 18, 1994, that Court issued its decision, a per curium opinion affirming the district court's denial of her Motion to Dismiss.

STATEMENT OF THE FACTS

The following reflects the testimony presented during **MS. MAURI**'S trial on Indictment No. 91-6179-Cr-PAINE. This Indictment charged **MS. MAURI** with two (2) counts of violating United States Code, §1709. Both allegedly occurred on or about August 19, 1991, while **MS. MAURI** was an officer and employee of the United States Postal Service. Each count charged her with knowingly, willfully and unlawfully stealing, abstracting and removing a

letter which was contained within the General Mail Facility, 1900 W. Oakland Park Blvd., Ft. Lauderdale, Florida and which had been entrusted to her and had come into her possession intended to be conveyed by mail. The only difference between Count I and Count II was that the former dealt with a letter addressed to Treva M. Devers, 9870 Nob Hill Ct., Sunrise, Florida 33351-4621, while the latter dealt with a letter addressed to Edwin W. Gluckin, 4919 Umbrella Tree Ln., Ft. Lauderdale, Florida 33319-3547.[1]

On November 19, 1991, **MS. MAURI** was tried on these charges.[2] After the jury

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[1]. A copy of Indictment No. 91-6179-CR-PAINE is attached to **MS. MAURI'S** "Motion to Dismiss" Indictment No. 92-6033-CR-PAINE as Exhibit "A". R1-25.

[2]. A copy of the transcript of this trial is attached to **MS. MAURI'S** "Motion to Dismiss" as Exhibit "B". R1-25. All references to it will be noted by "Exh.

was sworn (and jeopardy attached, United States vs. Matta, 937 F.2d 567 (11th Cir. 1991), **MS. MAURI** brought to the district court's attention her entitlement to a Judgment of Acquittal on these charges at the first opportunity. After the government outlined the facts it intended to present to prove **MS. MAURI** twice violated Title 18, United States Code, §1709, on August 19, 1991, Exh. B, pages 9-11, **MS. MAURI** moved the district court to enter a Judgment of Acquittal on these charges. Exh. B, pages 12-14. Citing the binding precedent of United States v. Trevino, 491 F.2d 74 (5th Cir. 1974),' **MS. MAURI** sub-

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B", followed by the appropriate page number.

' Trevino addressed the prosecution under Title 18, U.S.C., §1709, of a postal service employee who, unlike **MS. MAURI**, prior to trial moved to dismiss an indictment which charged him

mitted that she could not be found guilty of violating Title 18, United States Code, §1709, as alleged in Indictment 91-6179-Cr-PAINE, under the facts the government planned to prove. **Exh. B, pages 12-14.** As **MS. MAURI** then emphasized, she was

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with "unlawfully steal[ing], abstract[ing], and remov[ing] a first-class letter . . . which . . . had theretofore been entrusted to him and which had come into his possession intended to be conveyed by mail." Finding that theft and embezzlement were distinct and separate crimes, the Former Fifth Circuit reversed the district court's denial of the motion to dismiss because it did not sufficiently allege either of the two crimes -- embezzlement of a letter by a postal service employee or theft of letter's contents by a postal service employee -- §1709 proscribes. 491 F.2d at 75. **MS. MAURI** relied upon Trevino for the straightforward proposition that she could not be convicted of the offenses lodged against her because a postal service employee cannot steal a letter entrusted to him/her in the course of his/her duties.

moving solely for a Judgment of Acquittal. In response, the district court decided to "go ahead with the evidence and see what the evidence showed". Exh. B, page 14.

The government presented the testimony of Omar Besada, a supervisor at the General Mail Facility in Fort Lauderdale, Florida, Exh. B, pages 15-21, William R. Willoughby, a United States Postal Inspector, Exh. B, pages 21-42, and Lucy Jones, another United States Postal Inspector, Exh. B, pages 43-68, to prove these charges. Besada testified **MS. MAURI** was an employee of the United States Postal Office and that she worked at the General Mail Facility in Fort Lauderdale, Florida, on August 18 and 19, 1991, as a letter-sorting machine operator. Willoughby twice saw **MS. MAURI**, while operating her letter-sorting machine, look at a letter

she was sorting, remove it from the stream of mail she was processing and then place it under her shirt. Jones arrested **MS. MAURI** and watched her remove the two letters secreted in her pants. Jones also witnessed **MS. MAURI'S** confession and heard her explain why she did what the postal inspectors watched her do.

After these witnesses testified, the district court recessed trial so the government could research the issue raised by **MS. MAURI'S** Motion for Judgment of Acquittal. **Exh. B, pages 68-72.** When court reconvened, the government presented its arguments in opposition to **MS. MAURI'S** Motion for Judgment of Acquittal based on United States vs. Trevino. **Exh. B, pages 72-74.** These arguments include that: United States v. Trevino had been "wrongfully" decided and that Indictment 91-

6179-Cr-PAINE was "clearly" supported by the facts and "contain[ed] the language 'entrusted to her' which is the element needed for embezzlement." The government later repeated this argument just before the district court ruled. **Exh. B, page 76.**);

After the government advanced these arguments, **MS. MAURI** renewed her motion for a Judgment of Acquittal, again emphasizing she was moving only for a Judgment of Acquittal. **Exh. B, pages 74-5.**

The district court ultimately denied **MS. MAURI'S** Motion For Judgment of Acquittal; instead, it chose to order, sua sponte, the dismissal of Indictment No. 91-6179-Cr-PAINE pursuant to United States vs. Trevino. **Exh. B, page 76.** In so ruling the district court stated that it could not say that this dismissal was "not

on the evidence." In particular, the district court noted the following:

> It seems to me the evidence is clear that the activity charged is not within the charge made in the Indictment, so we are taking the evidence as it has been shown thus far in the case, and I don't think there is going to be any problem with that. Exh. B, page 77.

Thereafter, the district court repeated its belief that Indictment No. 91-6179-Cr-PAINE "ought to be dismissed, but we don't think it ought to be characterized as an acquittal." Exh. B, page 77. This comment came after the district court acknowledged that **MS. MAURI** had sought only a judgment of acquittal. Exh. B, page 78. Finally, during a colloquy initiated by the government, the district court stated that it was not making a ruling in favor of the defendant on the evidence. Exh. B, page 79.

REASON FOR GRANTING THE WRIT

THIS COURT'S DECISION IN UNITED STATES V. SCOTT, 437 U.S. 82 (1978), WHICH EXPRESSLY OVERRULED UNITED STATES V. JENKINS, 420 U.S. 358 (1975), DID NOT ALSO OVERRULE FINCH V. UNITED STATES, 433 U.S. 676 (1977), SUB SILENTIO AND, SINCE IT DID NOT, FINCH PROHIBITS **MS. MAURI**'S REPROSECUTION FOR CONDUCT SHE HAS ALREADY BEEN TRIED FOR AND ACQUITTED OF.

Of the three protections the Double Jeopardy Clause embodies, this case implicates the protection against a second prosecution for the same offense after acquittal. **MS. MAURI**'S "Motion to Dismiss" demonstrated she could not be prosecuted on Indictment 92-6033-Cr-PAINE because she had been previously prosecuted for and acquitted of the conduct it embraced when she was tried on Indictment No. 91-6179-Cr-PAINE. In support of her claim **MS. MAURI** relied upon Finch v.

United States, 433 U.S. 676 (1977). In response, the government argued both to the district court and to the Eleventh Circuit that Lee v. United States, 432 U.S. 23 (1972) controlled the issue and that Finch v. United States had been overruled. Government's Brief to the United States Court of Appeals for the Eleventh Circuit, page 19. Significantly, the government never argued that Finch would not bar re-prosecution of **MS. MAURI**; in fact, on page 13 of its brief, the government argued that had **MS. MAURI** claimed the "indictment charged the wrong crime for the facts stipulated" dismissal would be required. This is the holding of Finch, i.e. that the dismissal of a charge prior to entry of a verdict on the ground the stipulated facts do not state an offense bars retrial, has never been over-

ruled by this Court; as a result; it cannot be ignored by a lower court. To the extent the Eleventh Circuit did in rejecting **MS. MAURI'S** Double Jeopardy claim it violated the principal that a federal appellate court may not ignore a decision of this Court which has not been expressly overruled. See: Rodriguez De Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485 (1989).

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Not surprisingly, Finch has been cited as binding precedent in numerous lower court decisions. See, for example, State v. Torres, 805 S.W.2d 418, 420 (Tex.Cr. App. 1991); Foster v. State, 635 S.W.2d 710,

712 (Tex.Cr. App. 1982); State v. Melin, 428 N.W.2d 227, 235 (N.D. 1988) (dissenting opinion); City of Dickinson v. Kraft, 472 N.W.2d 441, 443 (N.D. 1991); Commonwealth v. Smalis, 480 A.2d 1046, 1050 (Pa. Super. 1884); Buffington v. Copeland, 687 F.Supp. 1089, 1099 (W.D. Tex. 1988); State v. Joshua, 818 S.W.2d 249 (Ark. 1991), overruled on other grounds 835 S.W.2d 869 (Ark. 1992); People v.Kurtz, 414 N.E.2d 699, 704 (N.Y. 1980)(dissenting opinion); United States v. Harvey, 392 A.2d 1049, 1052 (D.C.Ct. App. 1978)(concurring opinion).

In addition, the government cited two decisions for its claim that Finch v. United States had been overruled sub silentio, United States v. Lane, 768 F.2d 834 (7th Cir. 1985), and United States v. Kehoe, 579 F.2d 971 (5th Cir. 1978). In

Lane, decided after Finch was supposedly overruled, the Seventh Circuit noted that Finch gave it "pause". 768 F.2d at 838. Then, after opining that Finch had been overruled, though not mentioned in the case which supposedly overruled it, United States v. Scott, 437 U.S. 82, 87 (1978), the United States Court of Appeals for the Seventh Circuit acknowledged it could be wrong. 768 F.2d at 839. In Kehoe, the former Fifth Circuit vacated the portion of its opinion which relied upon United States v. Jenkins, 420 U.S. 350 (1979), after Jenkins had been expressly overruled by United States v. Scott. No mention, however, was made in Kehoe of Finch.

The first question which must be decided is whether Scott overruled Finch. An analysis of the former precedent shows it did not. In Scott, the defendant was

charged in a three-count indictment with distribution of narcotics. Both before trial and during trial, the defendant moved to dismiss two counts on the ground his defense had been prejudiced by pre-indictment delay. At the close of all the evidence, the district court granted the defendant's motion to dismiss. The jury later acquitted the defendant of the third count.

The government appealed the dismissal of the two counts to the United States Court of Appeals for the Sixth Circuit. Relying upon United States vs. Jenkins[4],

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[4] The Supreme Court held in Jenkins that the government could not retry a defendant after an indictment had been dismissed following the attachment of jeopardy because "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and

the Sixth Circuit concluded that any further prosecution of the defendant was barred by the Double Jeopardy Clause and it dismissed the appeal. The government then sought review in this Court which, after explicitly overruling United States vs. Jenkins, reversed the Sixth Circuit's order of dismissal. 437 U.S. at 87.

In so ruling, this Court held that the Double Jeopardy Clause is not offended by a second prosecution which follows a prosecution that was terminated prior to its conclusion pursuant to a defendant's motion for mistrial or motion to dismiss. 437 U.S. at 93.

> Such a motion by the defendant is deemed to be a deliberate election on his part to forego his valued right to have his guilt or innocence determined

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remand." 432 U.S. at 87.

> before the first trier of fact. 437 U.S. at 94.

After finding that the government was willing to continue presenting the evidence it had showing the defendant's guilt before the first jury and that it was the defendant who chose to avoid conviction and imprisonment, this Court concluded that in such a case the defendant "by deliberately choosing to seek termination of the proceeding against him on a basis unrelated to factual guilt or innocence of the offense of which he was accused, suffers no injury cognizable under the Double Jeopardy Clause if the government is permitted to appeal from such a ruling of the trial court in favor of the defendant". 437 U.S. at 99.

> We now conclude that where the defendant himself seeks to have the trial terminated without any submission to either judge or jury as to his guilt or inno-

> cence, an appeal by the government from his successful effort to do so is not barred by Title 18, U.S.C. [Section] 3731. 437 U.S. at 101.

In the course of so ruling, this Court noted that "a defendant is acquitted only when 'the ruling of the judge, whatever it is labeled, actually represents a resolution [in the defendant's favor], correct or not, of some or all factual elements of the offense charged". 437 U.S. at 97.

Although Scott explicitly overruled United States vs. Jenkins, the majority opinion did not mention, let alone address, Finch vs. United States, 433 U.S. 676 (1977). The dissent did. 437 U.S. at 103, n. 1. The author of Scott, now Chief Justice Rehnquist, dissented in Finch primarily on the issue whether jeopardy attached when the parties submitted a set of stipulated facts to the district court

for its determination of the defendant's guilt or innocence. The dissent noted that Jenkins did not control the resolution of this issue ("I do not believe that this case is controlled by Jenkins"). 433 U.S. at 681. Moreover, this Court's decision in Scott (overruling Jenkins) would not have effected the outcome in Finch. Simply put, Finch posed no issue Scott overruled and as a result, the argument that Scott overruled Finch sub silentio does not withstand scrutiny. Furthermore, the dissent in Finch "was not prepared to say that the Court's decision on the legal issue involved here (i.e. whether the defendant illegally fished on Indian land) is wrong." 433 U.S. at 679.

Because Finch is indistinguishable from the instant case, it governs **MS. MAURI'S** claim if Scott did not overrule

it. Finch was charged with knowingly fishing on a portion of the Big Horn River in Montana which was reserved for used by Crow Indians in violation of Title 18, U.S.C. §1165. The case was submitted to the district court on a stipulated set of facts which showed the defendant had cast his lure into the river while standing on land owned by the State of Montana within the exterior boundaries of the Crow Reservation. After considering the stipulated facts and reviewing the applicable law, the district court dismissed the information for failure to state an offense.[5]

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[5]. According to the government's analysis of Finch, in the Response to **MS. MAURI'S** Motion to Dismiss it filed with the district court, the district court's "remarkable" ruling was based upon its conclusion "that the defendant was not standing on Indian land, or land reserved exclusively for the Indians." R1-25, page 12. This "remarkable" conclusion constituted an acquittal because it represented a determination (favorable to the defen-

The government appealed to the United States Court of Appeals for the Ninth Circuit which reversed the district court's decision. In so ruling, the Ninth Circuit found the Double Jeopardy Clause did not bar the government's appeal because the determination the case presented was a legal one only and thus no additional fact-finding would need to occur in the event its legal conclusions were found to be erroneous. Reaching the merits, the Ninth Circuit held that when the facts were applied to the applicable law, the government had proved a violation of Title 18, U.S.C. §1165.

This Court vacated this judgment. In its ruling, this Court held the Ninth

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dant) based upon evidence pertaining to an element of the offense. So viewed, it its clear Finch survived Scott contrary to the government's claim.

Circuit lacked jurisdiction to entertain the government's appeal because the Double Jeopardy Clause barred it. In addition, this Court held that the district court's dismissal "on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged" was not the type of finding of guilt which could be reinstated pursuant to a successful appeal by the government. Under these circumstances, this Court directed the Ninth Circuit to dismiss the government's appeal. 433 U.S. at 677.

In the instant case, **MS. MAURI** took no action which sought to terminate her trial on Indictment No. 91-6179-Cr-PAINE prior to and without a determination of her guilt or innocence. In fact, she only moved for a Judgment of Acquittal. Thus, **MS. MAURI** bears no responsibility for

causing the type of termination of her first trial which Scott held permits a second trial.

In addition, the district court's sua sponte dismissal of Indictment No. 91-6179-Cr-PAINE actually acquitted **MS. MAURI** of the charges. After hearing the evidence the district court correctly determined **MS. MAURI** could not be found to have stolen, abstracted or removed the letters as a matter of law under United States v. Trevino. Thus, the district court's ruling represented a ruling (favorable to **MS. MAURI**) on one element of the crime. **Exh. B, page 77.** As such and no matter how the district court characterized its action, its decision constituted an acquittal under Scott. As a result, **MS. MAURI** cannot be re-prosecuted for her conduct of August 18 and 19, 1991 under

Finch, if it was not overruled sub silentio in Scott.

If **MS. MAURI** had moved to dismiss Indictment 91-6179-Cr-PAINE before or after jeopardy had attached, Scott and Lee v. United States, 432 U.S. 23 (1977), would not bar her re-prosecution.' But she did not. She moved only for a Judgment of Acquittal on the charges contained therein because the conduct the government intended to prove and did prove could not

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'. In addition, any argument that the district court's sua sponte interruption of **MS. MAURI**'S first trial was due to manifest necessity (thereby permitting her re-trial) due to a defective indictment is undermined by the government's twice-repeated argument to the district court that Indictment No. 91-6179-CR-PAINE was sufficiently plead and the evidence supported the charges it contained. Exh. B, pages 72-74; 76. This argument had to have been predicated on the government's belief Indictment No. 91-6179-CR-PAINE was properly plead and thus not subject to a motion to dismiss.

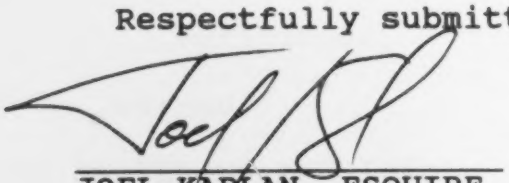
and did not support the violations alleged.

Simply put, the district court effectively acquitted **MS. MAURI** much like the district court did in Finch, notwithstanding its characterization of its action as a dismissal when it found she could not be convicted of what she was charged with. Under Finch, which needs to be re-affirmed in light of the confusion Scott appears to have created, see, for example, United States v. Lane, supra, the Double Jeopardy Clause says **MS. MAURI** cannot again be prosecuted for her conduct on August 18 and 19, 1991. The district court's contrary ruling constitutes reversible error, as does the Eleventh Circuit's failure to reverse it.

CONCLUSION

For the reasons stated in this petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR
WRIT OF CERTIORARI

UNITED STATES V. MARISELA MAURI
No. 92-4896 (11th Cir. filed
March 18, 1994) A.1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-4896

D.C. Docket No. 92-CR-6033-JCP

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus,

MARISELA MAURI,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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March 18, 1994

Before BLACK, Circuit Judge, DYER, Senior Circuit Judge, and ALAIMO, Senior District Judge

PER CURIAM: AFFIRMED. See 11th Cir. R.36-1

(2)

No. 93-2063

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

MARISELA MAURI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars petitioner's trial on a new indictment when her first indictment was dismissed for failure to state an offense.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Finch v. *United States*, 433 U.S. 676 (1977)	5, 6
Illinois v. *Somerville*, 410 U.S. 458 (1973)	9, 10
Lee v. *United States*, 432 U.S. 23 (1977)	4-5, 10
Oregon v. *Kennedy*, 456 U.S. 667 (1982)	9
United States v. *Allied Towing Corp.*, 602 F.2d 612 (4th Cir. 1979)	8
United States v. *Boyd*, 566 F.2d 929 (5th Cir. 1978)	5, 7
United States v. *Finch*:	
548 F.2d 822 (9th Cir. 1976), vacated, 433 U.S. 676 (1977)	6
395 F. Supp. 205 (D. Mont. 1975), rev'd, 548 F.2d 822 (9th Cir. 1976)	5, 6
United States v. *Jenkins*, 420 U.S. 358 (1975)	6, 8
United States v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977)	8
United States v. *Scott*, 437 U.S. 82 (1978)	8-9
United States v. *Trevino*, 491 F.2d 74 (5th Cir. 1974)	2, 3, 7
United States v. *Wagstaff*, 572 F.2d 270 (10th Cir. 1978)	8
United States ex rel Young v. *Lane*, 768 F.2d 834 (7th Cir.), cert. denied, 474 U.S. 951 (1985)	5, 8

Constitution and statutes:

U.S. Const. Amend. V (Double Jeopardy Clause)	2, 3, 4, 5, 6, 8, 9

Statutes—Continued:

	Page
Assimilative Crimes Statute, 18 U.S.C. 13	4
18 U.S.C. 1165	5, 6
18 U.S.C. 1709	2, 7

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-2063

MARISELA MAURI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1) is unpublished, but the decision is noted at 19 F.3d 35 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1994. The petition for a writ of certiorari was filed on May 16, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the Southern District of Florida on two counts of embezzling letters while being a Postal Service employee, in violation of 18 U.S.C. 1709. Prior to trial, she moved to dismiss the indictment, claiming that the Double Jeopardy Clause barred the prosecution. The district court denied that motion, and on interlocutory appeal the court of appeals affirmed. Pet. App. A1.

1. In 1991, petitioner was indicted in the Southern District of Florida. The indictment alleged that petitioner, "while an officer of the United States Postal Service, did knowingly and willfully steal, abstract and remove [two letters] * * * entrusted to her and which came into her possession intended to be conveyed by mail; in violation of Title 18, United States Code, Section 1709." Gov't C.A. Br. 3. Petitioner did not challenge her indictment prior to trial. In its opening statement, the government asserted that petitioner had been observed in the act of stealing two letters containing unsigned credit cards from a Postal Service sorting facility. Petitioner then moved for a judgment of acquittal. She argued that, accepting the government's characterization of the pertinent facts, the indictment did not charge a crime under *United States* v. *Trevino*, 491 F.2d 74 (5th Cir. 1974), because under Section 1709 the charged offense should have been embezzlement of mail rather than stealing mail. Gov't C.A. Br. 4-5.[1]

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[1] Section 1709 proscribes the embezzlement, by a Postal Service officer or employee, of "any letter, postal card, package, bag, or mail, or any article or thing contained therein entrusted to him or which comes into his possession intended to be conveyed by mail." 18 U.S.C. 1709. The statute also establishes criminal penalties for any person who "steals, abstracts, or removes from any such letter,

Government counsel stated that she could not respond to this argument because of the lack of notice of petitioner's claim. The district court decided to permit the government to present its evidence. At the close of the government's case, the court heard argument on petitioner's motion for a judgment of acquittal. The court denied that motion but *sua sponte* dismissed the indictment for failure to state an offense. Gov't C.A. Br. 6-8. The court stated that it was not making a ruling on the evidence. *Id.* at 8-9. In a later written order, the district court stated that it had dismissed the indictment under *Trevino*. Pet. Supp. App. A3. The court also stated that it would "not rule on the issue of double jeopardy as such a determination is premature at this time." *Id.* at A4.

2. In March 1992 petitioner was reindicted, this time for embezzling letters. Petitioner moved to dismiss the indictment on double jeopardy grounds, but the district court denied that motion. Pet. Supp. App. A1-A2. On interlocutory appeal, the court of appeals affirmed the district court's ruling. Pet. App. A1.

ARGUMENT

Petitioner contends that the Double Jeopardy Clause bars the instant prosecution. That argument is without merit. Because petitioner's first indictment was dis-

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package, bag, or mail, any article or thing contained therein." In *Trevino*, the Fifth Circuit stated that "the first offense under the statute is that of embezzlement and includes (1) letters or (2) articles contained therein. The second offense is that of stealing articles removed from any such letter as distinguished from the letter itself." 491 F.2d at 75. The court concluded that an indictment charging the defendant with stealing a letter "failed to state an offense and must be dismissed." *Id.* at 76.

missed for failure to charge an offense, she may be tried on the second indictment.

1. In *Lee* v. *United States*, 432 U.S. 23 (1977), this Court considered facts very similar to those of the instant case. *Lee* involved the theft of two billfolds from the blind concession operator in the lobby of a United States Post Office in Indiana. Lee was charged with theft, in violation of the Assimilative Crimes Statute, 18 U.S.C. 13, and the applicable Indiana statute. After the prosecutor's opening statement, Lee moved to dismiss the information on the ground that it did not allege knowledge or the intent to deprive the victim of his property, essential elements of the crime of theft under Indiana law. See 432 U.S. at 24-25.

As in the instant case, the district court in *Lee* permitted the government to present its evidence before ruling on the motion to dismiss. The court ultimately concluded that the government had presented sufficient evidence to support a conviction, but that the failure of the information to charge knowledge or intent required dismissal of the charge. Lee was subsequently retried pursuant to an information alleging all of the elements of the assimilated state crime. He was convicted, and the Seventh Circuit affirmed, rejecting his contention that the second trial was barred by the Double Jeopardy Clause. See 432 U.S. at 26-27.

This Court affirmed. It stated that "[w]here a midtrial dismissal is granted on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged, * * * further prosecution is barred by the Double Jeopardy Clause." 432 U.S. at 30. The Court concluded, however, that

> the proceedings against Lee cannot be said to have terminated in his favor. The dismissal clearly was

> not predicated on any judgment that Lee could never be prosecuted for or convicted of the theft of the two wallets. To the contrary, the District Court stressed that the only obstacle to a conviction was the fact that the information had been drawn improperly. The error, like any prosecutorial or judicial error that necessitates a mistrial, was one that could be avoided—absent any double jeopardy bar—by beginning anew the prosecution of the defendant. And there can be little doubt that the court granted the motion to dismiss this case in contemplation of just such a second prosecution. In short, the order entered by the District Court was functionally indistinguishable from a declaration of mistrial.

Id. at 30-31. Subsequent decisions by the courts of appeals have recognized that the Double Jeopardy Clause does not bar reprosecution following the discovery of a defect in the first charging instrument. See, *e.g.*, *United States* v. *Boyd*, 566 F.2d 929, 932 n.5 (5th Cir. 1978) (citing *Lee*); *United States ex rel. Young* v. *Lane*, 768 F.2d 834, 839 (7th Cir.) ("If the prosecution makes a mistake in drafting the indictment, and this causes a mid-trial dismissal, that may be corrected and the trial redone.") (citing *Lee*), cert. denied, 474 U.S. 951 (1985).

2. Petitioner relies upon this Court's decision in *Finch* v. *United States*, 433 U.S. 676 (1977), issued 16 days after the ruling in *Lee*. In *Finch*, the defendant was charged by information with going upon Indian trust land for the purpose of fishing, in violation of 18 U.S.C. 1165. See *United States* v. *Finch*, 395 F. Supp. 205, 207 (D. Mont. 1975), rev'd, 548 F.2d 822 (9th Cir. 1976), vacated, 433 U.S. 676 (1977). The district court presided over a nonjury trial, and the case was submitted to the court on an agreed statement of facts. The court

examined the language of treaties between the United States and various Indian Nations to determine whether the defendant had committed a violation of applicable law. The court determined that the land in question was not in fact Indian trust land, and concluded on that basis that "the information on file herein does not state an offense against the United States." 395 F. Supp. at 213.

The government appealed. The court of appeals rejected Finch's claim that the Double Jeopardy Clause barred the appeal, holding that because no additional findings of fact would be necessary in the district court, a different ruling on the law would not violate the defendant's double jeopardy rights. *United States* v. *Finch*, 548 F.2d 822, 824-827 (9th Cir. 1976), vacated, 433 U.S. 676 (1977). After a lengthy discussion of the pertinent treaties, 548 F.2d at 827-834, the court held that the land in question was Indian trust land and that Finch had violated 18 U.S.C. 1165. 548 F.2d at 835.

This Court reversed, holding that the government's appeal from the dismissal of the indictment was barred by the Double Jeopardy Clause. Relying in part on *United States* v. *Jenkins*, 420 U.S. 358 (1975), the Court observed that the effect of the court of appeals' remand was to require additional proceedings in the district court. 433 U.S. at 677. The Court concluded that

> [b]ecause the dismissal was granted prior to any declaration of guilt or innocence, "on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged," *Lee*, [432 U.S.] at 30, we hold that the Government's appeal was barred by the Double Jeopardy Clause.

Ibid.

The instant case is plainly controlled by *Lee* rather than by *Finch*. In dismissing the indictment, the

district court here did not question the government's contention that the conduct in which petitioner was alleged to have engaged constituted a violation of 18 U.S.C. 1709. Nor did the court question the sufficiency of the evidence presented in support of the government's charges. Rather, the court's decision was based on a technical defect in the drafting of the indictment, a defect unrelated to the merits of the government's legal theory or the adequacy of its proof.

There is consequently no merit to petitioner's claim (Pet. 27) that dismissal of the first indictment constituted an "acquittal" of the underlying charges. Nor is the dismissal accurately characterized as resting on a determination that petitioner "could not be found to have stolen, abstracted or removed the letters as a matter of law under *United States v. Trevino*." *Ibid.* As *Trevino* makes clear, the defect in the initial indictment was that 18 U.S.C. 1709 does not prohibit stealing letters—not that the evidence showed petitioner to be innocent of such a charge. See 491 F.2d at 76 ("Appellant was charged with stealing a letter and the statute does not embrace such a charge."). The situation is thus closely akin to that in *Lee*, where the allegations in the charging instrument (which included no allegation of knowledge or intent) did not state a violation of Indiana law, but where the evidence presented at trial (if credited by the finder of fact) was clearly sufficient to support a conviction. The courts of appeals have recognized the distinction between the technical drafting defect involved in *Lee* and the failure of proof involved in *Finch*. See, *e.g.*, *United States* v. *Boyd*, 566 F.2d at 932 n.5 (noting that "in *Lee* the district court dismissed the information after both sides rested because the information failed to charge either knowledge or intent as required by Indiana law, and not because the

government failed to prove such knowledge or intent"); *United States* v. *Allied Towing Corp.*, 602 F.2d 612, 616 (4th Cir. 1979) (emphasizing that the district court in *Finch* "addressed factual elements of the crime charged and * * * the dismissal resolved questions determinative of guilt in favor of the defendant"); *United States* v. *Wagstaff*, 572 F.2d 270, 272 (10th Cir. 1978) (discussing *Lee* and *Finch*, and noting the distinction between "a lack of proper pleading" and "a defect in the case, whereby the accused can never be convicted").[2]

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[2] The Court in *Finch* placed substantial reliance on *United States* v. *Jenkins*, 420 U.S. 358 (1975). In *Jenkins* the Court held that the Double Jeopardy Clause prevents the government from appealing *any* midtrial termination if "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand." *Id.* at 370. *Jenkins* was later overruled in *United States* v. *Scott*, 437 U.S. 82, 101 (1978), which held that a district court's midtrial dismissal of an indictment based on pre-indictment delay was subject to appeal by the government. The Court explained that when a defendant obtains termination of his trial on a ground unrelated to factual guilt or innocence, the Double Jeopardy Clause does not bar an appeal by the government, even where a successful appeal would necessitate a second trial. *Id.* at 96. Although the government may not appeal an "acquittal," the Court emphasized, "a defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" *Id.* at 97 (quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)).

One court of appeals, noting that this Court has not subsequently relied upon *Finch*, has expressed the view that "*Scott* overruled *Finch* along with *Jenkins*." *United States ex rel. Young* v. *Lane*, 768 F.2d 834, 838-839 (7th Cir.), cert. denied, 474 U.S. 951 (1985). Some aspects of the Court's opinion in *Scott*—particularly its assertion that "an appeal is not barred simply because a ruling in

3. Nor is there merit to petitioner's contention (Pet. 26-27) that the second prosecution was barred because she requested a judgment of acquittal rather than dismissal of the initial indictment.[3] In *Illinois* v. *Somerville*, 410 U.S. 458 (1973), a state prosecutor in drafting an indictment made the same error as was made in *Lee*, omitting any allegation of intent to deprive the victim of his property. See 410 U.S. at 459. The trial court declared a mistrial *over the defendant's objection*

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favor of a defendant * * * is granted on the ground that the defendant simply cannot be convicted of the offense charged," 437 U.S. at 96-97 (ellipsis and internal quotation marks omitted)—indeed cast doubt upon the continuing vitality of *Finch*. As we explain in the text, however, dismissal of the initial indictment in the instant case would not bar a subsequent prosecution even under the approach taken in *Finch*.

[3] In determining whether the Double Jeopardy Clause bars reprosecution after a mistrial, this Court has distinguished between cases in which "the trial is terminated over the objection of the defendant" and those involving "a mistrial declared at the behest of the defendant." *Oregon* v. *Kennedy*, 456 U.S. 667, 672 (1982). In the former context, a second prosecution is barred unless there was a "manifest necessity" for the mistrial, *ibid.*; but in the latter setting a second prosecution can go forward unless "the prosecutor's actions giving rise to the motion for mistrial were done in order to goad the defendant into requesting a mistrial." *Id.* at 673 (brackets and internal quotation marks omitted).

It is far from clear that the present case is accurately characterized as one in which "the trial [was] terminated over the objection of the defendant." 456 U.S. at 672. Petitioner argued to the district court that the indictment failed to state an offense, and she based her argument on *Trevino*, although the relief she sought was a judgment of acquittal rather than dismissal of the indictment. As we explain in the text, however, dismissal of the indictment in this case satisfied even the "manifest necessity" standard applicable where a trial is terminated over the defendant's objection.

after jeopardy had attached. *Id.* at 459-460. The Court held that the Double Jeopardy Clause did not bar a second prosecution, *id.* at 461-471, because the grant of a mistrial was justified under the standard of "manifest necessity" announced in prior decisions. *Id.* at 469.[4] Similarly here, petitioner's failure to request dismissal of the indictment does not alter the effect of the district court's ruling.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1994

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[4] As the Court subsequently noted in *Lee*, "[t]here is no reason to believe that *Somerville* would have been analyzed differently if the trial judge, like the District Court here, had labeled his action a 'dismissal' rather than a mistrial." 432 U.S. at 31 n.9.